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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,
Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BRISTOL-MYERS COMPANY

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December 15, 1971

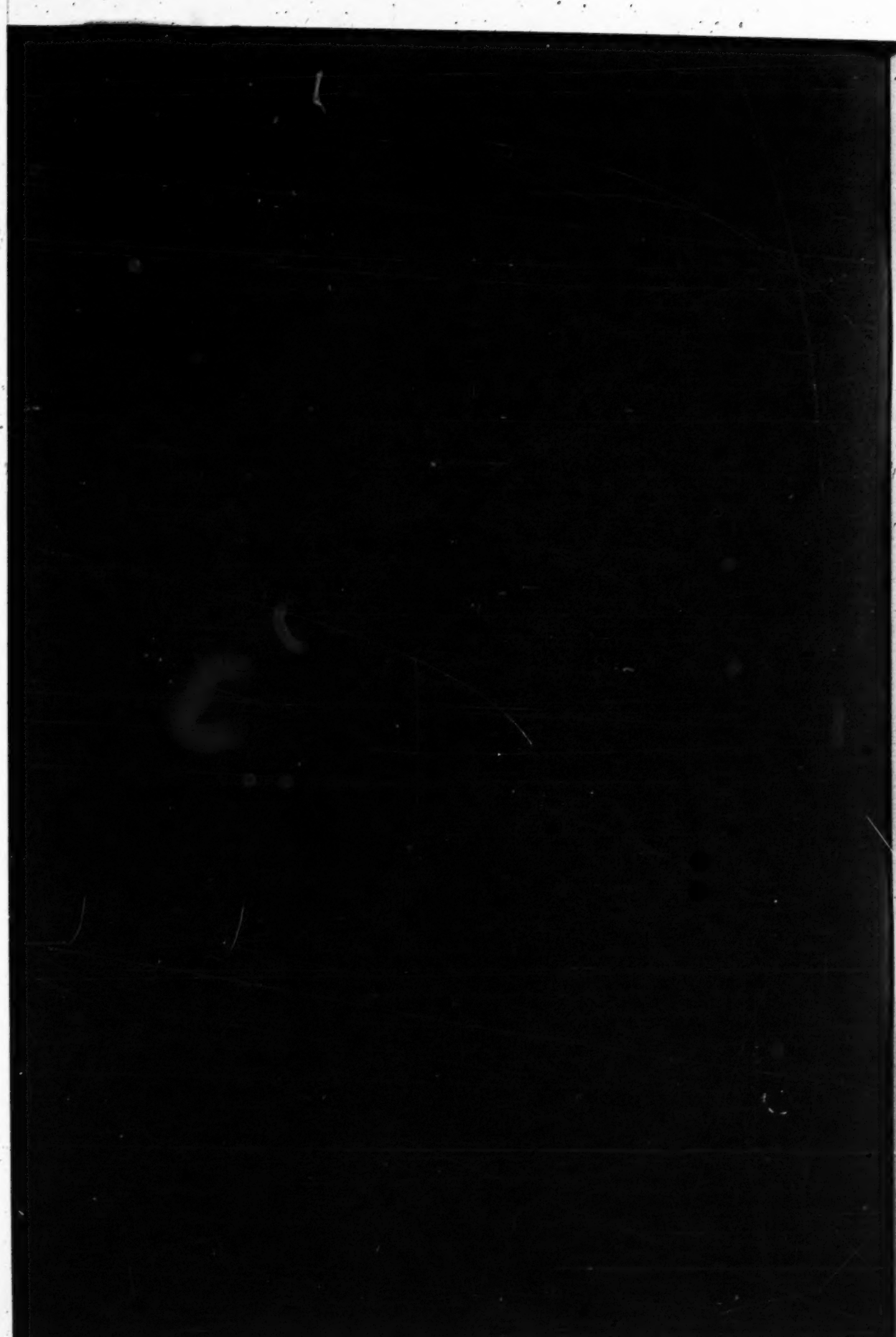

TABLE OF CONTENTS

	PAGE
Question Presented	2
Statement of Facts	3
The Sufficiency of the Evidence Against Bristol	3
Bristol's Special Role in Tetracycline	5
Bristol before Tetracycline	6
Tetracycline Appears	6
The Patent Office Proceedings	7
Bristol's Entry into the Market; Its Decision to Sell to Two Bulk Customers	8
Cyanamid's Infringement Suit against Bristol	9
The Pfizer Infringement Litigation Against Bristol, Squibb and Upjohn	10
Upjohn's Fear of Losing the Infringement Litigation	11
The Wiretapping Trial: A Stimulus to Settlement	13
The December 14-15, 1955 Meeting	14
Bristol's Pricing Policies	15
Dismissal of the Infringement Suits and Bristol's Filing of the Depositions	17
Summary of Argument	19
The Licenses to Squibb and Upjohn	19
The Date when Bristol Allegedly Joined the Conspiracy, and the "Pre-conspiracy" Evidence	20

PAGE

Argument 21

I—The Court of Appeals Correctly Held That Bristol's Right to a Fair Trial Was Prejudiced By the Trial Court's Erroneous Instruction That the Pfizer Licenses to Squibb and Upjohn Barred Them From the Manufacture of Tetracycline 21

The Instruction was Incorrect 23

The Instruction was Misleading and Prejudicial 26

Other Errors in the Trial Court's Instructions Relating to the Squibb and Upjohn Licenses 33

The Rights Desired by Upjohn 33

The Implied Rights Received by Squibb and Upjohn 38

The Rights Squibb and Upjohn Had to Sell Bulk Purchased from Bristol 40

II—The Court of Appeals Correctly Held That There Was Prejudicial Error in the Trial Court's Failure to Instruct The Jury Regarding Bristol's "Pre-Conspiracy" Conduct and in the Misleading Instruction Given Concerning the Date of Bristol's Alleged Entry 41

The Court of Appeals' Determination of Prejudicial Error is in Accordance with Well-Settled Principles 43

The Instructions Permitted the Jury to Convict Bristol for Acts Prior to the Date It Allegedly Entered the Conspiracy 46

Conclusion 49

TABLE OF CASES AND OTHER AUTHORITIES

Cases:

	PAGE
American Cyanamid Co. et al., Matter of, (FTC Docket No. 7211), Initial Decision of Hearing Examiner (October 30, 1961), TRADE REG. REP. [1961-63 Transfer Binder] ¶ 15,537	3, 11
American Cyanamid Co. et al., Matter of, (FTC Docket No. 7211), First Decision of Full Commission, 63 F.T.C. 1747 (1963)	3, 40
American Cyanamid, et al. v. *FTC,* 363 F.2d 757 (6th Cir. 1966)	3
American Cyanamid et al., Matter of, (FTC Docket No. 7211), Decision of Full Commission Upon Remand (Sept. 29, 1967), TRADE REG. REP. [1967-70 Transfer Binder] ¶ 18,077	4
Automatic Radio Co. v. *Hazeltine,* 339 U. S. 827 (1950)	23
Bollenbach v. *United States,* 326 U. S. 607 (1946)	21, 29, 31, 47
Bruton v. *United States,* 391 U. S. 123 (1968)	30
Davis v. *Buck-Jackson Corp.,* 230 F.2d 655 (4th Cir. 1956), *cert. denied,* 351 U. S. 950 (1956)	25
Downie v. *Powers,* 193 F.2d 760 (10th Cir. 1951)	45
Dunkley Co. v. *California Packing Corporation,* 277 Fed. 996 (2d Cir. 1921), *cert. denied,* 257 U. S. 644 (1921)	39
First National Bank of Arizona v. *Cities Service Co.,* 391 U. S. 253 (1968)	17
Illingworth v. *Spaulding,* 43 Fed. 827 (D.N.J. 1890)	39, 40
King v. *United States,* 372 F.2d 383 (D. C. Cir. 1967)	27
Kotteakos v. *United States,* 328 U. S. 750 (1946)	31, 32, 44
Krulewitch v. *United States,* 336 U. S. 440 (1949)	30, 32
Lear, Inc. v. *Adkins,* 395 U. S. 653 (1969)	18, 25
Mas v. *Coca-Cola Co.,* 163 F.2d 505 (4th Cir. 1947)	13

PAGE

Nash v. *United States*, 229 U. S. 373 (1913) 32

People v. *Broady*, 6 App. Div.2d 674 (1st Dep't 1958), *aff'd.*, 5 N. Y.2d 500 (1959), *cert. denied sub nom.*, *Broady* v. *New York*, 361 U. S. 8 (1959) 13

Chas. Pfizer & Co., Inc. v. *Olin Mathieson Chemical Corp.*, 131 F.Supp. 21 (N.D. Ga. 1955), *appeal dismissed*, 225 F.2d 718 (5th Cir. 1955), *petition for mandamus denied sub nom., Ex parte Chas. Pfizer & Co., Inc.*, 225 F.2d 720 (5th Cir. 1955) 10

Ross v. *United States*, 180 F.2d 160 (6th Cir. 1950)..... 45

State of West Virginia v. *Chas. Pfizer & Co., Inc., et al.*, 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub nom., Cotler Drugs Inc.* v. *Chas. Pfizer & Co., Inc.*, 92 S.Ct. 81 (1971) 5

Steam Stone Cutter Co. v. *Shortsleeves*, 22 Fed. Cas. 1168 (No. 13,334) (C.C.D. Vt. 1879) 39

United States v. *Antonelli Fireworks Co., Inc.*, 155 F.2d 631 (2d Cir. 1946), *cert. denied*, 329 U. S. 742 (1946) 22

United States v. *Bless*, 422 F.2d 210 (2d Cir. 1970) 44

United States v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied sub nom., Cinquegrano* v. *United States*, 379 U. S. 960 (1965) 30

United States v. *Casale Car Leasing, Inc.*, 385 F.2d 707 (2d Cir. 1967) 30

United States v. *Christmann*, 298 F.2d 651 (2d Cir. 1962) 30

United States v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967) 31

U. S. v. *Houlihan*, 332 F.2d 8 (2d Cir. 1964), *cert. denied*, 379 U. S. 828 (1964) 48

United States v. *Hughes*, 389 F.2d 535 (2d Cir. 1968), *cert. denied*, 396 U. S. 867 (1969 ..... 30, 32

PAGE

United States v. *Kelly*, 349 F.2d 720 (2d Cir. 1965) *cert. denied*, 384 U. S. 947 (1966) 30, 44

United States v. *O'Connor*, 237 F.2d 466 (2d Cir. 1956) 45

United States v. *Perisco*, 349 F.2d 6 (2d Cir. 1965) 30

United States v. *Univis Lens Co.*, 316 U. S. 241 (1942) 40

United States v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970) 30

Virtue v. *Creamery Package Manufacturing Co.*, 227 U.S. 8 (1913) 17

Woodworth v. *Curtis*, 30 Fed. Cas. 565 (No. 18,013) (C.C.D. Mass. 1847) 40

Wright v. *United States*, 339 F.2d 578 (9th Cir. 1964) 45

Yates v. *United States*, 354 U. S. 298 (1957) 21, 32, 43, 44

Other Authorities:

RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE 45

4 DELLER'S WALKER ON PATENTS § 388 (2d ED., 1965) 39

J. POMEROY, EQUITY JURISPRUDENCE §§ 402, 404 (5th ed., 1941) 13

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BRIEF FOR RESPONDENT BRISTOL-MYERS COMPANY

Respondent Bristol-Myers Company ("Bristol") files this separate answering brief because

(a) A separate statement is required on Bristol's behalf emphasizing the important differences in the facts and in the results of prior proceedings which distinguish Bristol's position from that of the other respondents, and

(b) Two of the errors found by the Court of Appeals have special applicability to Bristol:

1. The trial court erroneously instructed the jury that the licenses to Olin Mathieson Chemical Corp. ("Squibb") and The Upjohn Company ("Upjohn") barred them from the manufacture of tetracycline.

2. The trial court erroneously failed to charge the jury with respect to the significance of Bristol's

"pre-conspiracy" conduct and compounded this error in the instructions respecting the date when Bristol allegedly joined the conspiracy.

As to other matters common to all respondents, Bristol joins in the briefs filed by Chas. Pfizer & Co., Inc. ("Pfizer") and American Cyanamid Company ("Cyanamid").

QUESTION PRESENTED

The government states that the first question presented is "whether, in reversing criminal convictions * * * because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury" (G.Br. 2).

This begs the question rather than poses it. The Court of Appeals did not consider particular language "in isolation" or fail to evaluate "the charge in its entirety" or fail to consider "all the evidence and the defendants' arguments to the jury." The majority below expressly refers to "its review of the *entire charge*"* (426 F.2d at 41; 12598a) and concludes with the statement:

> "A review of the *entire record* leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them." (426 F. 2d at 48; 12611a)

In its statement of the second question presented, the government purports to describe each of the errors found by the Court of Appeals. But this description is neither complete nor entirely accurate.

* Emphasis ours. Unless otherwise noted, emphasis in passages quoted in this brief will be ours.

Properly stated, the controlling question presented for review is:

> Whether the Court of Appeals is correct in holding that the errors committed by the trial court were sufficiently prejudicial to deprive Bristol of a fair trial.

STATEMENT OF FACTS

The Sufficiency of the Evidence against Bristol

The question of the sufficiency of the evidence is not before this Court.* The government, however, has sprinkled its brief with gratuitous references such as "comprehensive evidence of conspiracy" and "ample evidence to convict," and has stated that the case against Bristol "was a strong one" (G.Br. 32, 49, 89). The very opposite is true, as the results of the prior proceedings amply demonstrate.

1. The same charges were tried in a lengthy proceeding before the Federal Trade Commission, *Matter of American Cyanamid, et al.* (F.T.C. Docket No. 7211). The Hearing Examiner held that none of the charges had been sustained (TRADE REG. REP. [1961-1963 Transfer Binder] ¶15,537).

2. On an appeal to the Commission, the Initial Decision was unanimously affirmed as to the monopolization aspects of the alleged conspiracy but not as to the pricing aspects (63 F.T.C. 1747). The Commission's decision as to the pricing aspects was vacated by the Sixth Circuit (363 F.2d 757), and in subsequent proceedings before the Commission the

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* The question of the sufficiency of the evidence was raised in the Court of Appeals. It was one of the "many other contentions advanced by the defendants" which the Court of Appeals did not reach (opinion denying rehearing, 437 F.2d 957, 959; 12619a). See respondents' briefs before the Court of Appeals on file with clerk of this Court.

price-fixing charges were dismissed by a 2-2 vote ((Sept. 29, 1967), TRADE REG. REP. [1967-1970 Transfer Binder] ¶18,077). The Commission did reaffirm findings that Pfizer and Cyanamid separately had misconducted themselves before the Patent Office. But with respect to Bristol, all charges were dismissed.

3. In this criminal case the Court of Appeals clearly regarded the case against the respondents as a close one. The majority referred to it in the opinion denying rehearing as "a criminal case so close as this" (437 F.2d at 959; 12618a). Even the dissenting judge conceded that the government's evidence was "not overwhelming" (426 F.2d at 48; 12611a).

4. The majority below commented that one of the "most persuasive" contentions which they did not reach in their decision was "Bristol's argument that there was insufficient evidence to warrant submission to the jury of the issue whether that company had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market." The Court went on to say that "we now incline to that view" (437 F.2d at 959; 12619a).

5. In an opinion approving the settlement of certain civil cases against the respondents based upon the allegations of the Federal Trade Commission complaint and the indictment below, the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, considered the plaintiffs' "probabilities of ultimate success." He made the following comment:

> "The situation here is unique in that the evidence on which liability at trial would depend is in substantial part before the Court on this application. That evidence is in the extensive record before the Sixth Circuit Court of Appeals in the Commission proceeding and in the extensive record before our Court of Appeals in the criminal proceeding.
>
> "A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight.***

"After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the anti-trust laws." (*State of West Virginia* v. *Chas. Pfizer & Co., Inc., et al.*, 314 F.Supp. 710, 741 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub nom., Cotler Drugs Inc.* v. *Chas. Pfizer & Co., Inc.*, 92 S.Ct. 81 (1971))

Bristol's Special Role in Tetracycline

When Bristol entered the tetracycline market in May 1954 it was *not* as a result of any agreement with Pfizer and Cyanamid. Quite the contrary. Bristol was then engaged in hotly fought Patent Office proceedings with both Pfizer and Cyanamid. And the fighting soon got even hotter. In September 1954 Cyanamid brought a patent infringement suit against Bristol seeking to enjoin the manufacture and sale of tetracycline. On January 11, 1955 Pfizer brought a similar suit against Bristol for infringement of the tetracycline patent which had issued that very day. The government asserted at the trial that the activities of Pfizer and Cyanamid were for the purpose of "stifling their then principal competitor, Bristol" (1119a).

But Bristol was not stifled. It was successful in breaking into the tetracycline market and bringing in its bulk customers, Squibb and Upjohn, as well.

Bristol acquired no basic patent rights in the tetracycline field and never brought any suit against anyone for infringement of the few improvement patents it had on processes for making tetracycline (4292a-93a). Although the government originally charged Bristol with improper

activities in the Patent Office, the trial court, with acquiescence by the government prosecutor, withdrew these charges from the jury's consideration (4525a-26a, 4971a).*

Bristol before Tetracycline

Bristol Laboratories went into production of penicillin in World War II, and within a very few years almost all its manufacturing facilities were devoted to this product. Most of its production was sold as bulk penicillin to other drug manufacturers who compounded and resold it in product forms under their own labels. Bristol had a very small sales force and sales under the Bristol label were insignificant (1831a, 1833a-34a, 2874a-75a, 3004a-05a).

Tetracycline Appears

In the fall of 1953 reports came to Bristol's management through the press that Pfizer and Cyanamid had each independently produced a new broad spectrum antibiotic drug. It was called tetracycline (BX 20, 629; 10436a, 12459a-460a).

It became apparent to Bristol that tetracycline was the same as an antibiotic substance which Bristol itself had discovered in its laboratory in 1950. Bristol had worked with this substance in an attempt to isolate it in pure form, but these attempts were only partially successful (2875a-76a, 3094a-96a). Immediately after the press reports of the Pfizer and Cyanamid discoveries, Bristol embarked upon a crash program, using all its scientific and production capabilities, to get its tetracycline on the market (BX 629, 124592-60a, 1834a-35a, 3008a-09a).

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* Although the government notes this withdrawal at one point in its brief (G.Br. 53), it improperly includes Bristol in statements elsewhere that there was "evidence that the respondents misled the patent office" (G.Br. 33) and that "defendants cooperated with each other in obtaining a patent monopoly" (G.Br. 88).

The Patent Office Proceedings

On October 19, 1953 Bristol filed an application for a patent on tetracycline and on a process for producing it by direct fermentation (GX 9, 7682a-886a; BX 629, 12459a-60a; 2876a-77a, 3008a-09a). Bristol realized that it would be a latecomer in the Patent Office since it correctly assumed that Pfizer and Cyanamid had filed patent applications on tetracycline prior to their announcements (3008a-09a, 8084a-86a; GX 4-6, 7368a-552a).

On December 28, 1953 the Patent Office declared an interference between Cyanamid and Pfizer, but Bristol was not included. Pfizer and Cyanamid promptly settled this interference with Cyanamid conceding priority to Pfizer (GX 7 at 53 and 54, 7554a-66a; 8527a-60a).

On January 15, 1954 after a rejection of its original application, Bristol filed a continuation-in-part application primarily directed to salts of tetracycline in hopes of provoking another interference to which it would be a party (GX 10 at 86, 7991a). A second interference, on tetracycline hydrochloride (the form in which tetracycline was originally marketed) was declared on March 2, 1954 between Bristol, Pfizer and Cyanamid (1733a-34a; GX 12, 8092a-8301a-1). This interference was bitterly fought. Even Bristol's routine request for an extension of time was opposed by Pfizer and Cyanamid who sought a quick termination of the interference and the elimination of Bristol from the tetracycline market (G.Br. 14-15; GX 12 at 114, 8186a).

In October 1954 the second interference was dissolved by the Patent Examiner, who rejected all applications on the ground that tetracycline must have been inherently co-produced along with Aureomycin in the production processes of Cyanamid's Aureomycin patents. The Examiner rejected the Bristol and Cyanamid applications on other grounds too, but with respect to Pfizer, inherent co-production was the only ground (GX 12 at 431-49, 8281a-99a *et seq.*).

In an effort to prevent Pfizer from overcoming the inherent co-production rejection, Bristol undertook a series of tests to provide scientific proof that samples of old commercial Aureomycin actually contained 2% to 4% of tetracycline. The results of these tests were set forth in an affidavit (the "Taylor affidavit") and filed in the Patent Office on January 3, 1955 (GX 9 at 176-81, 7855a-60a; 2991a-92a).

Despite the Taylor affidavit, however, a tetracycline patent issued to Pfizer on January 11, 1955 (GX 3, 7365a-67a; 3131a-32a).

Bristol's Entry into the Market; Its Decision to Sell to Two Bulk Customers

In May 1954 while the second interference was going on, Bristol commenced sales of tetracycline under its own trade name (1831a, 6693a).

Bristol recognized that it would have difficulty making inroads into the tetracycline market. Its product was identical to Cyanamid's and Pfizer's. Cyanamid had commenced sales in the fall of 1953 and Pfizer had followed in early 1954. Bristol had a tiny sales force, 39 men, while both Pfizer and Cyanamid had sales forces of from 600 to 700 men (BX 23, 10437a-38a; 1818a-19a, 2748a-50a, 2825a-26a, 6693a). In the face of this competition, Bristol's initial impact on the tetracycline market was slight indeed:

TETRACYCLINE SALES TO THE DRUG TRADE

	1954	1955
Cyanamid	$30,202,324	$38,949,574
Pfizer	5,898,708	9,324,642
Bristol	311,487	946,263

(Source: 6848a-50a)

Bristol hoped to increase sales under its own label by increasing its sales force and by developing new and better

tetracycline products. Bristol realized, however, that to finance such a program and to support its plant, it needed to make bulk sales of tetracycline to other drug companies with established names and large sales forces (2894a-96a, 3015a-17a, 3152a). Bristol decided in mid-1954 to sell bulk to two such customers, Squibb and Upjohn (3015a-17a, 3122a-24a). Bristol chose not to sell to more than two customers because to do so would have increased the difficulty of developing a following for the Bristol label. It wished to sell to more than one, however, to avoid absolute dependence on a single customer (GX 191, 8752a-58a; 1817a-19a, 2894a-95a, 2926a, 3015a-16a, 3125a-26a, 3250a).

Bristol's overall marketing plans of selling in bulk to two customers only while endeavoring to increase sales under its own Bristol label were developed in 1954, more than a year prior to the date when Bristol is accused of having joined the alleged conspiracy. Bristol followed these marketing plans without change throughout the entire period covered by the indictment and, as the Government told the jury in its summation, these plans "succeeded brilliantly" (4833a).

Cyanamid's Infringement Suit against Bristol

In September 1954 just after Bristol had contracted to sell bulk tetracycline to Squibb and Upjohn and while the second patent interference was still pending, Cyanamid brought suit against Bristol for infringement of its Aureomycin patent. In December 1954 agreement was reached settling this suit. Formal papers were executed in January 1955. Bristol received an unrestricted license for the manufacture and sale of tetracycline (containing not more than 6% Aureomycin) and agreed to pay a 5% royalty to Cyanamid (GX 72, 8589a-630a; CYX 131, 12483a-85a; 2783a-86a, 2964a-66a, 3019a-20a).

The Pfizer Infringement Litigation against Bristol, Squibb and Upjohn

On the very day the tetracycline patent issued, January 11, 1955, Pfizer sued Bristol, Squibb and Upjohn in Atlanta for infringement (GX 15-17, 8383a-88a; 2374a, 2916a-17a, 3021a-22a, 3087a-88a).

Loss of this suit would have put Bristol out of business (3048a). Bristol, Squibb and Upjohn quickly filed suits in the District Court for the Southern District of New York for declaratory judgments against Pfizer's patent, and at the same time moved in the Georgia court for transfer of the Pfizer infringement suits to New York. This motion was ultimately successful despite strong resistance by Pfizer (GX 18-20, 8389a-95a; 3021a-22a).*

Bristol, Squibb and Upjohn promptly started extensive discovery of Pfizer in an effort to develop all available defenses (3021a-22a, 3088a-89a, 3091a, 3262a-63a; BX 69-75, 542-55, 10439a-68a, 10487a-12419a).

Pfizer had filed affidavits with the Patent Examiner describing experiments undertaken to overcome his rejection of tetracycline product claims on the ground of prior inherent co-production with Aureomycin. In its discovery proceedings in the infringement litigation, Bristol sought to establish that those affidavits were misleading (3087a-92a). Bristol compelled Pfizer to produce numerous documents relating to the experiments, and depositions were taken of several Pfizer scientists, including those who had made the affidavits for the Patent Office (BX 542-55, 10487a-12419a; 4278a-83a). Bristol thought the evidence it obtained was helpful but that it was far from conclusive.

Bristol, of course, could not be certain that it would win the case. Every trial lawyer recognizes that no lawsuit is

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* *Chas. Pfizer & Co., Inc.* v. *Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955), *appeals dismissed*, 225 F.2d 718 (5th Cir. 1955), *petition for mandamus denied sub nom., Ex Parte Chas. Pfizer & Co., Inc.*, 225 F.2d 720 (5th Cir. 1955).

a sure thing. The trial court below acknowledged that the outcome was uncertain and so instructed the jury (3038a, 3048a, 3092a, 3132a, 3134a-35a, 4982a-83a). The reasonableness of Bristol's doubt over the outcome is confirmed by the FTC Hearing Examiner's holding that the Patent Examiner was not in fact misled in issuing the patent and by the government's statement in its bill of particulars in this case that it "will make no • • • claim" that the Pfizer patent was invalid or otherwise unenforceable (TRADE REG. REP. [1961-1963 Transfer Binder] ¶ 15,537; 274a, 293a).

Upjohn's Fear of Losing the Infringement Litigation

Pfizer had asserted a claim for damages against Upjohn for $30,000,000 (GX 26, 8408a-09a). By the fall of 1955 Upjohn had become gravely concerned about the failure to establish a firm and reliable defense to the Pfizer patent (2903a, 3023a-24a, 3204a-05a). Upjohn was especially concerned because in its bulk purchase agreement with Bristol it had agreed to indemnify Bristol against damages for patent infringement.

Upjohn opened negotiations with Pfizer in October 1955 in an effort to obtain a separate settlement (2509a-13a, 3201a-17a). In these negotiations it was proposed that Upjohn purchase a substantial portion of its tetracycline from Pfizer (2510a-13a, 2567a-68a, 3209a-12a, 3215a-16a).

This had serious implications for Bristol. If it lost Upjohn as a bulk customer, it was doubtful that Bristol could operate at a profit. It was too late to obtain any other bulk customer, in view of the certainty that Pfizer would bring an infringement suit against any such customer (2903a, 2908a).

Bristol representatives went to the Upjohn offices in Kalamazoo, Michigan seeking to persuade Upjohn to abandon its efforts to make a separate peace with Pfizer (2903a-

04a, 3228a-34a). Bristol presented in the best possible light the various defenses which could be asserted in order to encourage Upjohn about the outcome of the suit (2913a-14a, 3024a-25a). But Upjohn was not persuaded. Upjohn was willing to abandon its efforts to settle separately with Pfizer only if Bristol would agree to reverse the indemnity provisions of the original bulk purchase agreement under which Upjohn had agreed to hold Bristol harmless against damages for patent infringement (3229a, 3239a-40a). Bristol reluctantly agreed to reversing the indemnity and offered to hold Upjohn harmless from any damages for patent infringement if Upjohn would turn over to Bristol control of the defense of the suit and would purchase its requirements of tetracycline from Bristol for the duration of the litigation plus three years. Upjohn at its option could discontinue purchases from Bristol upon assumption of its pre-existing indemnity obligations. Upjohn agreed to these proposals (GX 108, 8698a-705a; 2920a-23a, 2946a, 3229a-3245a).

As a special inducement to Bristol to seek a prompt settlement with Pfizer, Upjohn offered, despite the reversal of the indemnity, to pay half the cost of settlement and half of any continuing royalty obligation (a) if Bristol could settle with Pfizer within six months, and (b) if such settlement included a license to Upjohn to purchase, use and sell tetracycline to the drug trade (GX 108, 8698a-705a; 2922a, 3027a-28a, 3033a-35a). Bristol was not obliged to seek a license of any kind for Upjohn, but if it obtained a license meeting the description and achieved a settlement within six months, Upjohn was willing to pay half of the settlement costs and of future royalties arising out of Bristol's sales to Upjohn.

Having executed this agreement with Upjohn, Bristol offered a similar agreement to Squibb, and Squibb accepted (GX 83, 8639a-47a; 2893a, 3038a). These agreements with

Upjohn and Squibb were executed on Nov. 3 and Nov. 18, 1955, respectively, a time when, as the government said, "there is nothing about the activities of Bristol that we criticize or say are illegal" (4867a).

The Wiretapping Trial: A Stimulus to Settlement

In September 1955, Schwartz of Bristol received an unexpected call from the New York District Attorney asking him to come to the District Attorney's office about a matter which could not be discussed on the telephone. Schwartz went and learned to his surprise that Bristol's wires had been tapped by a private detective named Broady. The District Attorney would not say at that time who had hired Broady, but because of the hotly contested infringement litigation then pending with Pfizer, Schwartz suspected that Pfizer might be involved (3022a-23a). Broady was tried in November 1955, and convicted in early December.* At the trial it came out that Broady had indeed been retained by Pfizer who paid him $60,000 (2518a).

Immediately after the Broady trial, Schwartz read the transcript of the testimony. He testified that he was "outraged at what had been done to our company" and he instructed Bristol's patent attorney to tell Pfizer's patent attorney that Bristol would interject the wiretapping into the infringement litigation.** Schwartz also told his counsel to send a copy of the Broady transcript to Pfizer, and this was done (2889a).

On the very next day, December 14, 1955, a settlement meeting was held between Schwartz and McKeen and their

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* See *People* v. *Broady*, 6 App. Div. 2d 674 (1st Dep't 1958), *aff'd.*, 5 N. Y. 2d 500 (1959), *cert. denied sub nom., Broady* v. *New York*, 361 U. S. 8 (1959).

** The evidence adduced at the Broady trial gave Bristol a substantial legal weapon in the form of a possible unclean hands defense and the basis of a counterclaim for appropriation of confidential business information if Bristol could prove that the wiretap was authorized by Pfizer. *Mas* v. *Coca-Cola Co.*, 163 F.2d 505, 508 (4th Cir. 1947); J. POMEROY, EQUITY JURISPRUDENCE §§ 402, 404 (5th ed. 1941).

respective patent counsel (2889a-90a). The meeting reconvened the following day. The government claims that Bristol joined the alleged conspiracy at this meeting.

The December 14-15, 1955 Meeting

This is the meeting at which the government contended "Schwartz made that deal with McKeen"—the "deal" being Bristol's supposed agreement or understanding to join the alleged conspiracy already existing between Pfizer and Cyanamid (4867a). But the government did not adduce any direct evidence that such a "deal" was made, and the testimony of the participants at the meeting was to the contrary (2568a-69a, 2734a-35a, 3042a, 3081a-82a).

A settlement of the existing infringement litigation was reached and the terms incorporated in a letter of intent, which was signed by Schwartz and McKeen (GX 95, 8678a-81a, 3038a-41a). This is another of the agreements which the government conceded in its bill of particulars was not in itself illegal (280a). Both Schwartz and McKeen testified categorically, in both general terms and in specifics, that they had not reached any agreement with respect to prices or with respect to manufacturing rights for Squibb and Upjohn, and indeed had not even discussed these matters (2568a-69a, 2734a-35a, 3042a, 3081a-82a).

Prior to the meeting, during the twenty months in which Bristol had been in the tetracycline market, Bristol had set its list prices to match those of Pfizer and Cyanamid and Parke, Davis; following the meeting, it continued the same practice. Prior to the meeting, Bristol had limited its bulk sales to two customers, Squibb and Upjohn; following the meeting, Bristol continued the same practice. Its actions before the meeting were conceded by the government to be legal and not even subject to criticism (4867a). It was these facts plus the absence of any direct evidence

of conspiracy which led the Court of Appeals to observe skeptically:

> "It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14-15 meetings been changed merely by continuance into acts thereafter illegal." (426 F.2d at 47; 12610a)

Bristol's Pricing Policies

When Bristol commenced selling tetracycline on May 4, 1954 it set its published prices at the same levels as Cyanamid, Pfizer and Parke, Davis, who were already in the broad spectrum market (1782a, 1850a, 3063a-65a). The government does not contend that Bristol's deliberate decision to charge the same prices as Pfizer, Cyanamid and Parke, Davis was the result of any conspiracy. Squibb entered the market in September 1954 and Upjohn entered in October 1954 (6693a). Generally speaking they also met the existing published prices and, just as in Bristol's case, the government does not contend that their deliberate decision to charge these prices was the result of any conspiracy.

Bristol's policy of meeting the published prices of its competitors never changed. In particular, there was no change in any aspect of its pricing policy in December 1955 (1850a, 3043a, 3069a, 3081a-82a). Both before and after December 14-15, 1955 Bristol met the lowest published price of any competitor to each class of trade (1782a, 1850a, 3043a).

The government contends that inferences of conspiracy may be drawn from the fact that published prices to the retail trade and to private hospitals remained the same for broad spectrum drugs from October 1951 through July 1960 despite shifting sales volume, changes in market shares, and differences in production costs (G. Br. 23-26).

This contention is simplistic in the extreme. It must be remembered that two of those years had gone by before it is claimed that anyone joined the alleged conspiracy and nearly half of the period had gone by before it is claimed that Bristol joined in December 1955.

Moreover, for the twenty months preceding December 1955, Bristol had been setting its prices to meet those of its competitors, and the government not only concedes but asserts that this was legal (4867a). This same twenty months saw the most dramatic reduction in Bristol's production costs for the whole period covered by the indictment. Bristol's production cost for a bottle of 100 250 mg. capsules was $60.25 in May 1954 and was down to $4.91 by December 1954 (GX 934, 10325a). The fact that Bristol made no price change in response to this remarkable change in production cost is not commented on by the government.

No inference of conspiracy arises from Bristol's failure to reduce *its* prices as *its* market share changed. Bristol's market share climbed steadily upwards. Starting from less than 1% in 1954, Bristol worked its way up to 6.8% in 1961 (GX 876, 10245a).

The government also contends that the profitability of broad spectrum antibiotics of the respondents substantially exceeded the profitability of other drug products (G.Br. 27-28, 47). This was simply not true with respect to Bristol. Bristol's gross margins on its tetracycline products did not vary materially from its gross margins on its total product line. The following table is made up from Government Exhibit 838 (9139a-63a), and reflects Bristol's

sales under its own label. It is similar to a calculation made by a witness during the trial (1797a-1800a):

GROSS MARGIN, AFTER FACTORY COST AND ROYALTIES, AS A PERCENTAGE OF SALES

Year	Tetracycline	Total Bristol Line
1957	77.1	71.6
1958	76.7	74.9
1959	77.3	77.9
1960	81.4	80.6

As the table shows, Bristol's gross margin for tetracycline products was lower in the year 1959 than it was for Bristol's total product line. In other years the differences are so slight that by comparison the tetracycline gross margin can be deemed neither unreasonable nor unusual.

Dismissal of the Infringement Suits and Bristol's Filing of the Depositions

The government charged in this case that as one of the "means and methods" of the alleged conspiracy "Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent" (34a).

The "suppression" of litigation referred to by the government is simply Bristol's settlement of the infringement suits brought by Pfizer. But settlement of litigation is favored by the courts.* And it was entirely proper for Bristol as indemnitor to assume control of the defense and settlement of the cases against Squibb and Upjohn.**

As noted at page 11 above, the trial court in the present case recognized that Bristol could not be certain the in-

* It is established law that settlement of litigation, even with parties who may themselves be members of a previously existing anti-trust conspiracy, does not constitute joining such a conspiracy. *Virtue* v. *Creamery Package Manufacturing Co.*, 227 U. S. 8 (1913); *cf. First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 274, n. 13 (1968).

** See 5598a-5600a.

fringement suits could be won. Settlement ensured that Bristol, Squibb and Upjohn could continue to compete. In settling, these defendants did not acknowledge patent validity, their licenses (GX 50, Art. VIII, 8496a-97a; GX51, Art. VII, 8509a-10a; GX52, Art. VII, 8522a-83a) merely expressing the usual licensee estoppel against contesting validity under the law prior to *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969).

The government implies that the Pfizer-Bristol license agreement limited Bristol to its two "presently existing bulk customers" (G.Br. 22). This is not the case. In referring to the paragraph of the license which provides for computing royalties to "presently existing bulk customers" (GX 50, p. 9, 8488a), the government overlooked the parallel provision for computing royalties on sales to others (GX 50, p. 10, 8489a). Bristol received an unlimited right "to ferment or otherwise manufacture, make, compound, use and sell" tetracycline (GX 50, p. 4, 8483a).

In his summation to the jury, the government prosecutor admonished: "Never mind what happened before December 1955 as far as Bristol is concerned and this conspiracy is concerned. Keep your eye on what happened after December 1955" (4867a). But it is undisputed that *nothing* happened after December 1955 so far as Bristol's marketing practices were concerned that had not been happening prior to that date. The only significant event following Bristol's settlement with Pfizer was the public filing by Bristol with the court clerk of the depositions that had been taken of the Pfizer witnesses in the infringement suit. These depositions referred to "all of the Pfizer documents used by the government", in the trial of the case at bar, in examining the two Pfizer scientists who had submitted affidavits to the Patent Office on co-production of tetracycline with Aureomycin (except for one tabulation prepared for the 1958 FTC proceeding) (GX 907, 10280a-83a; 4281a-83a).

Bristol's filing of these depositions is totally inconsistent with the accusation that "Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent" (34a). Bristol placed on public record the evidence which it had unearthed in its defense of the Pfizer suit, making the information available to anyone who wished to follow Bristol's lead in challenging the Pfizer patent (BX 69-75, 10439a-68a; 3048a).

SUMMARY OF ARGUMENT

As stated at the outset, Bristol joins in the Pfizer and Cyanamid briefs. Bristol's separate argument is limited to the holdings of the Court of Appeals with regard to the trial court's charge on (1) the Squibb and Upjohn licenses, and (2) the significance of Bristol's "pre-conspiracy" activities and the date when Bristol is alleged to have joined the conspiracy.

The Licenses to Squibb and Upjohn

In instructing the jury as to the legal effect of the licenses which granted to Squibb and Upjohn certain rights to purchase, use and sell tetracycline to the drug trade, the trial court construed those licenses as containing a "restriction forbidding manufacture" and a "limitation on Squibb and Upjohn, which barred them from manufacturing" (4988a-89a). This instruction was incorrect, as all three judges below recognized and as the government tacitly concedes. There was no "restriction" in those licenses "forbidding manufacture" and no covenant or other provision which "barred" Squibb and Upjohn from manufacturing. The government contends that the Court of Appeals was being "hypertechnical" in holding that this error was prejudicial (G.Br. 79). But the trial court was not merely "technically incorrect" (G.Br. 76); its error went to the heart of the case against Bristol.

The Date when Bristol Allegedly Joined the Conspiracy, and the "Pre-conspiracy" Evidence

The government staked its case against Bristol on the proposition that Bristol entered the alleged conspiracy at a meeting between its president, Schwartz, and Pfizer's president, McKeen, which was held on December 14th and 15th, 1955. The government's bill of particulars specified this meeting as the date of Bristol's entry, and government counsel told the jury that "until the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal" (278a, 4867a).

Virtually all of the evidence relating to Bristol concerned its activities prior to the critical meeting. The Court of Appeals held that this circumstance called for "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to Dec. 14-15, 1955 as proof of Bristol's being in any conspiracy" prior to that date (426 F.2d at 47; 12610a). Bristol had requested such instructions and the trial judge had said he would include them in substance (5586a-88a, 4658a-59a). Nevertheless the trial judge failed to do so. And he compounded the error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4963a-64a).

The Court of Appeals held that this failure to differentiate between the legal and the illegal was prejudicial error (426 F.2d at 47; 12609a-10a).

ARGUMENT

I

The Court of Appeals Correctly Held That Bristol's Right to a Fair Trial Was Prejudiced By the Trial Court's Erroneous Instruction That the Pfizer Licenses to Squibb and Upjohn Barred Them From the Manufacture of Tetracycline.

The Court of Appeals held that Bristol's right to a fair trial by jury in this criminal case was substantially impaired by the trial court's incorrect instruction—an instruction tacitly conceded by the government to be erroneous—that the licenses to Squibb and Upjohn "barred" and "forbid" them from manufacturing tetracycline.

The government in attacking the Court of Appeals for refusing to consider this error harmless to Bristol reverts to the usual generalities: the trial court's error was but "subtle", "putative" and "abstract", "technical", indeed "hypertechnical" (G. Br. 36-37, 76, 79, 90)*; the "lengthy" charge on this subject when seen in its "entirety" and "totality", in light of the entire record, was "fair" and "correct" and portions of it should not be taken "out of context" or "in isolation" and criticized (G.Br. 2, 32, 35, 38, 76); and although Bristol was "vigorously and well represented" at the trial, the case against it was "a strong one",

* Compare *Bollenbach* v. *United States*, 326 U. S. 607, 614-15 (1946): "we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. . . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished". See also *Yates* v. *United States*, 354 U. S. 298, 327 (1957): "the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges".

its conviction "justified" by the evidence, and after all, this is merely an ordinary criminal trial, not one in which "a person's life is at stake" (G.Br. 89, 91). We deal with these matters *infra*.

The government also regresses to a raising of spectres: unless reversed, the Court of Appeals' determination of prejudicial error on this point would not only result in the "unnecessary additional expense" of a new trial (G.Br. 92) but would constitute a "dangerous impediment" to "hospitable" enforcement of the antitrust laws, "impair" their deterrent effect and serve as an "invitation to other companies to risk violations of antitrust laws" (G.Br. 36, 90, 92); would "improperly limit" a trial court's "discretion" to explain matters to a jury "in non-technical terms it can understand" (G.Br. 79); and, indeed, "could become a ground for reversal in any case where organized or complex criminal activity is at issue and the trial is lengthy and routine instructions" are involved, with adverse effect on the morale of prosecutors and on "law and order"* itself (G. Br. 36, 92).

As to the government's dire predictions, it seems to us an affront to this Court to posit such frightening consequences from a straightforward determination that the trial court in this particular case erred in instructing a jury that the legal effect of certain licenses to Squibb and Upjohn (obtained for them from Pfizer by Bristol) was to exclude them from the manufacture of tetracycline, and that this erroneous instruction (in a context where the jury had been told it must convict Bristol on all counts if it found that Bristol had agreed with Pfizer that Squibb and Upjohn would be so excluded) may very well have been

* This phrase appears in the quotation (G. Br. 92) from *United States* v. *Antonelli Fireworks Co., Inc.*, 155 F.2d 631, 641-642 (2d Cir. 1946), *cert. denied*, 329 U. S. 742 (1946), best known for the dissertation in Judge Frank's dissent on prejudicial and harmless error, 155 F.2d at 642-666.

responsible for Bristol's conviction. The trial court's mischaracterization of these licenses as "forbidding" or having "barred" manufacture is plain* and undefended by the government. The resulting prejudice to Bristol, within a narrow framework set for determination of its guilt, is also plain. This error and this prejudice are unique to the present case. It is nonsense to assert that to allow their correction by the Court of Appeals will send out shockwaves adversely affecting the very foundations of antitrust and criminal law enforcement throughout the land.**

The Instruction was Incorrect

The government nowhere defends or discusses the trial court's mischaracterizations of the Squibb and Upjohn licenses as *"forbidding"* and having *"barred"* the manufacture of tetracycline. Instead, it wrongly states:

> "The trial judge referred to the licenses to Squibb and Upjohn as restricted" (G. Br. 35) [and] "the trial court referred to the licenses to Squibb and Upjohn as *'limited'* or *'restricted'*. The court of appeals considered this as technically incorrect and misleading" (G. Br. 76).

Actually, the trial court's incorrect instruction did *not* refer to the Squibb and Upjohn licenses as *"limited"* or *"restricted"*, nor did the Court of Appeals hold that the instruction was erroneous for using these words. What the trial court's instruction did say, and what the Court of Appeals condemned, was that the Squibb and Upjohn licenses each contained a *"restriction* forbidding manufac-

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* Also see *Automatic Radio Co.* v. *Haseltine*, 339 U. S. 827, 836 (1950). And see *infra*, pp. 38-40 regarding the implied rights to manufacture granted to Squibb and Upjohn by their licenses.

** According to the Index to Legal Periodicals, the opinion of the Court of Appeals, handed down more than a year and a half ago, has not been picked up for comment by any law review or other legal periodical.

ture by Squibb and Upjohn" and a *"limitation* on Squibb and Upjohn, which *barred* them from manufacturing" (4988a-89a, 426 F.2d at 45-46; 12607a-08a).

Thus, the government's argument does not deal with what the trial court actually said or with what the Court of Appeals actually held. In defending the propriety of language which was *not* used by the trial court or relied on by the Court of Appeals, the government refers to three earlier instances at the trial where Squibb and Upjohn licenses were referred to as "restricted" or "limited" (G.Br. 78). But this does not justify the trial court's incorrect instruction to the jury that the legal effect of the licenses was affirmatively to restrict Squibb and Upjohn. And this important distinction had been made by Bristol throughout the trial. For example, when the government prosecutor in his closing argument referred to the licenses as "restrict*ing*" Squibb and Upjohn, Bristol's counsel promptly objected (4881a; see also 3103a-04a). During the ensuing colloquy the trial court expressed uncertainty as to the legal effect of the licenses in this regard and said he would "think overnight" what, if anything, he would instruct the jury on this subject (4882a). In the instruction as given, the trial court committed error.

The difference between a "limited" or even a "restricted" license and one containing a "limitation" or "restriction" which bars and forbids, subtle though it may be as a matter of words, is no mere nicety of language but a substantive distinction between (a) a license granting rights which are "limited" in the sense they constitute less than complete immunity from suit for any manufacture, use or sale of the patented invention and (b) a license so limited which goes further (as by a covenant) and contains or constitutes an actual "limitation" or "restriction" upon the licensee's conduct in the unlicensed area. With the first type of license, the license would not bar the licensee from engaging in unlicensed activities (while risking an infringement suit, a

risk he may be willing to take*); the second type of license, on the other hand, would constitute such a bar. The first type of license does not purport to inhibit the licensee's freedom of action to do what he could do before; the second type does so inhibit, and indeed may be frowned upon by a court even if unilaterally granted.

The government's failure to come to grips with the critical words used in the instruction: "barred", "forbidding", "limitation", "restriction", its misstatements that the trial court merely referred to the licenses as "limited" and "restricted", and its related disingenuous allusions to the licenses as "non-manufacturing licenses" (G.Br. 6, 23, 38, 73),** cannot mask the fact that the instruction as actually given undoubtedly conveyed to the jury—as it was intended to convey***—a ruling that the licenses themselves precluded manufacture. But this interpretation was in-

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* Even prior to *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969), the existence of his limited license would not have estopped the licensee from contesting validity in an infringement suit against his activities in the unlicensed area. See *e.g. Davis* v. *Buck-Jackson Corp.*, 230 F.2d 655 (4th Cir. 1956), *cert. denied*, 351 U. S. 950 (1956), where the earlier authorities are collected.

** At G.Br. 6 the government improperly inserts the words "and not manufacture" after the word "sale" in a "summary" of the indictment's alleged "means and method" that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products" (35a). At G.Br. 23, after stating that Upjohn and Squibb received licenses to purchase, use and sell, the government states "They could not manufacture..."

*** The argument on exceptions to the charge included the following: "Mr. Clark: . . . In discussing the licenses that Squibb and Upjohn ultimately got, I believe your Honor told the jury that those licenses precluded or barred Upjohn and Squibb from manufacturing. The Court: I said they did contractually preclude or at least I meant to say it. Mr. Clark: But we except to that" (5019a). At the close of argument on all of the exceptions, although the trial judge stated "the one thing that gave me pause" was his treatment of the licenses to Squibb and Upjohn and that "part of what developed" for him from the argument on the point was "on this one, it is pos-

correct, as the licenses show (GX 51, 52, 8501a-26a) and as found by the Court of Appeals:

> "The agreements, however, disclose that there was nothing therein which barred them [Upjohn and Squibb] from manufacturing or which forbid manufacture. In fact there were no restrictive phrases whatsoever." (426 F.2d at 45-46; 12607a)

Even the dissenting opinion recognized:

> "The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission." (426 F.2d at 50; 12615a)

The Instruction was Misleading and Prejudicial

The opinion of the Court of Appeals sets forth (irrefutably we believe) how the foregoing error in the trial court's instruction on the Squibb and Upjohn licenses undoubtedly misled the jury on a point which very well may have been crucial to Bristol's conviction on all counts. The dissenting opinion, after conceding the instruction erroneous, goes on to say

> "It seems to me quite *unlikely* that the jury was *seriously* misled by this instruction." (426 F.2d at 50; 12615a)

With deference, we submit that it could not have been other than "serious" to Bristol for the jury to have been misled at all by this error. The error related to an issue at the very heart of the indictment's charge that Bristol criminally conspired to exclude Squibb and Upjohn from

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sible . . . that I may have slipped", he decided not to alter or supplement the instructions as given (5049a). Contrary to the impression given at G.Br. 38, n. 19, the opinion of the trial court (6446a-73a, 281 F. Supp. 837) denying defendants' motion for acquittal or a new trial, included no discussion of objections to the instructions relating to the Squibb and Upjohn licenses, although those objections were made briefed and argued by Bristol (6326a, 6342a-47a, 5105a-09a, 5118a-19a).

the manufacture of tetracycline. The jury was instructed, irrespective of the price-fixing charges, that it must convict Bristol on all counts if it concluded that Bristol had agreed with Pfizer, on December 14-15, 1955, to exclude Squibb and Upjohn from the manufacture of tetracycline 4955a-56a, 4960a, 4966a, 4999a). The error thus occurred in a very narrow area which the instruction itself stressed as "vital" and "critical" to the issue of Bristol's guilt (4988a-89a). And the error blazed so direct a path to Bristol's conviction that it cannot fairly be denied that the jury may have taken that path. As pointed out by the Court of Appeals:

> "The court, having incorrectly assumed that this bar existed, submitted to the jury the question of 'whether the limitation on Squibb and Upjohn, which barred them from manufacturing . . . was an agreed objective between Bristol and Pfizer in the issuance of that license.' The jury, in being so advised, might well have concluded that the December 1955 Bristol-Pfizer agreement was, in fact, a bar which violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist.
>
> "Furthermore, the term 'restriction' was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on. [*] The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do." (426 F.2d at 46; 12607a-08a)

Clearly on this "nerve center issue"** it cannot be assumed that the jury had the competence, the superior wis-

* See also 4960a, 4966-67a, 4988a. The instruction included a similar alternate use of the term "bar" (4955a, 4988a-89a).

** *King* v. *United States*, 372 F.2d 383, 395 (D.C. Cir. 1967).

dom or the incentive to correct or disregard the trial court's erroneous instruction on the legal effect of the Squibb and Upjohn licenses. Nor can it be assumed that the jury was dissuaded from reasoning along the lines noted by the Court of Appeals by the fact it also received an abstract instruction (quoted at G. Br. 74-76) that the government did not claim any of the licenses or other written agreements in the case was, alone or in combination, unlawful without reference to other facts. The jury undoubtedly was unaffected by this abstruse disclaimer, which the government itself ignored in arguing to the court and jury that in effect the written documents themselves show Bristol's guilt (*e.g.* 1132a-34a, 1492a-93a, 4531a-33a, 4877a-78a).*

On the allegation that Bristol conspired with Pfizer to keep Squibb and Upjohn from manufacturing tetracycline, the question for the jury was not whether Schwartz asked McKeen to grant to Squibb and Upjohn, and Pfizer agreed to grant, the license rights they actually received. The law does not condemn an agreement between a patent owner and a licensee which *provides* for the grant of license rights to others, even if less than a full bundle of rights, and the government does not so contend. The December 15, 1955 settlement memorandum includes such an agreement with respect to the licenses to Squibb and Upjohn,

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* In his summation to the jury, the prosecutor, after quoting that portion of the December 15, 1955 Bristol-Pfizer agreement which provided for the Squibb and Upjohn licenses, stated *"This* is Schwartz, through Pfizer, *putting into effect* the *restrictive* arrangement that he has in this November 3, 1955 agreement" (4878a).

The government continues, albeit more tacitly, to make this same argument in its present brief before this Court. See *e.g.* G.Br. 21, 34-35, in addition to the references noted *supra* to "non-manufacturing licenses". Lip service to the "disclaimer" and to the written agreements being only part of "the circumstantial evidence" of conspiracy to exclude also continues to be given (G.Br. 35). But the underlying argument remains that the November 1955, December 15, 1955 and March 31, 1956 agreements themselves prove that Bristol conspired to exclude.

and the government concedes this document is lawful on its face (GX95, 3038a-41a; B.P. ¶ 7, 272a, 280a).

The question for the jury was a critically different one: whether Schwartz and McKeen had a further agreement or understanding that Squibb and Upjohn would be barred from the manufacture of tetracycline (as by an agreement that Pfizer would not offer Squibb or Upjohn the license right to manufacture and would refuse this right if either requested it).* This question was answered for the jury by the trial court's erroneous ruling that the licenses which McKeen agreed with Schwartz to grant to Squibb and Upjohn barred them from manufacture, the following portion of the instruction, as the Court of Appeals noted (426 F.2d at 45-46), containing wholly within itself all the jury needed for conviction:

> "The *critical inquiry* on this score is whether the *limitation* on Squibb and Upjohn, which *barred them from manufacturing,* was the particular objective of Bristol and was *an agreed objective* between Bristol and Pfizer in the issuance of that license." (4988a-89a)

Singularly apposite here are these statements in *Bollenbach* v. *United States,* 326 U.S. 607, 612-614 (1946):

> "'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial

* This difference, although critical, was subtle enough to require careful, unblurred discernment on the part of the jury. Because of this, especially in view of the length and complexity of the trial, and the prosecutor's mischaracterizations of the written agreements noted *supra,* Bristol in its Request No. 32A asked the trial court to point out this difference in its charge (5597a). The request was denied (4699a), and denied again when renewed during exceptions to the charge (5017a-21a). The government's brief, although noting (G. Br. 74) that the Court of Appeals criticized the trial court's failure to charge the jury as requested (426 F.2d at 45), and defending in a heading that failure (G. Br. 79), does not discuss the correctness of the request to charge. In any event, the Court of Appeals, although referring to this failure to charge, bottomed its opinion on the plain error in the instruction as actually given.

for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States*, 289 U.S. 466, 469. 'The influence of the trial judge on the jury is necessarily and properly of great weight.' *Starr* v. *United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.[*]

". . . Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

". . . A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in

* On the inadequacy of general instructions to the jury where serious error exists on a vital point, see also *Bruton* v. *United States*, 391 U.S. 123, 129 (1968), which quotes Justice Jackson's famed statement in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949). Recent Second Circuit authority to the same effect includes *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970); *United States* v. *Hughes*, 389 F.2d 535, 537 (2d Cir. 1968), *cert. denied*, 396 U.S. 867 (1969); *United States* v. *Persico*, 349 F.2d 6, 10 (2d Cir. 1965); *United States* v. *Kelly*, 349 F.2d 720, 756-58 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Other cases pertinent here which stress the trial court's obligation to give the jury complete, clear and accurate legal guidance on the evidence and issues before it include *United States* v. *Casale Car Leasing, Inc.*, 385 F.2d 707, 710-11 (2d Cir. 1967); *United States* v. *Borelli*, 336 F.2d 376, 386, n.4 (2d Cir. 1964), *cert. denied sub nom.*, *Cinquegrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Christmann*, 298 F.2d 651, 653-54 (2d Cir. 1962).

fact he misguides them. To do so would transfer to the jury the judge's function in giving the law".*

In the present case there can be no doubt that the trial court's instructions were given great weight by the jury. Shortly after it retired to deliberate, the jury requested copies of the charge and twelve copies were furnished (5051a, 5060a-61a, 5064a, 7345a-46a). The jury's requests for exhibits and testimony cited the trial court's instructions by page and line (5071a, 7348a-49a). Following the verdict, the jurors made a special request that they be permitted to take home with them their copies of the charge, and this permission was granted (5077a).

The trial court's erroneous legal interpretation of the licenses to Squibb and Upjohn as barring manufacture provided a linchpin for Bristol's conviction by the jury in a case in which the majority of the Court of Appeals, in denying rehearing, said they "incline to the view"

* The government's statements (G. Br. 89) that error by the trial court should be held harmless because the case against Bristol was "strong" and its conviction "justified" by the evidence, are not only refuted by the facts, as discussed elsewhere in this brief, but also by *Bollenbach:* "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (326 U.S. at 614-615) See also *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). In the Second Circuit see *e.g. United States* v. *Guglielmini*, 384 F.2d 602, 604 (2d Cir. 1967) where the Court reversed despite the fact it believed "The proof amply supported the verdicts of guilty".

that there "was insufficient evidence to warrant submission to the jury" of the conspiracy-to-exclude charge against Bristol (437 F.2d at 959).* Certainly, the Court of Appeals correctly concluded there was at least grave doubt that the jury's conviction of Bristol was not substantially influenced by the erroneous instruction. Indeed, this instruction may have led directly to that conviction. But "grave doubt" is enough, in this criminal case, to have warranted the Court of Appeals in setting aside that conviction and ordering a new trial. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946), *Krulewitch* v. *United States*, 336 U.S. 440, 444-445 (1949).**

The government's brief implies that because this is an antitrust case involving large pharmaceutical companies the standards for review should be slackened. But the constitutional right to a fair trial belongs to all. It would be a sorry day for this country if courts embraced the view that a lesser standard of fairness and justice should be applied to certain defendants in criminal cases.

We are confident this Court will agree and will commend, rather than criticize the Court of Appeals for its "punctiliousness" (G.Br. 37) toward insuring a fair trial in this criminal case, as well as in others.***

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* See *supra*, pp. 3-5, for a discussion of (a) the earlier FTC proceedings, where all charges against Bristol were dismissed, on substantially identical evidence, and (b) the damage suit settlement proceedings, in which Judge Wyatt commented, in affirming the settlements, on plaintiffs' "slight" chances of recovery.

** Any right to a new trial based on this prejudicial error is of course unaffected by the fact that the jury also was asked to consider Bristol's guilt or innocence on the price-fixing charges, since it is impossible to say the jury did not base its conviction of Bristol solely on a determination of conspiring to exclude. Compare *Nash* v. *United States*, 229 U.S. 373, 379-380 (1913), *Yates* v. *United States*, 354 U.S. 298, 312 (1957).

*** The right to a fair trial should be protected for Bristol "so that it may continue to be available for all", *United States* v. *Hughes*, 389 F.2d 535, 537 (2d Cir. 1968), *cert denied*, 396 U.S. 867 (1969).

Other Errors in the Trial Court's Instructions Relating to the Squibb and Upjohn Licenses

At the trial the government contended that Squibb and Upjohn really wanted manufacturing rights in the licenses they received but that Bristol, desirous of keeping them as captive customers for bulk tetracycline, did not want them to get any such rights and arranged matters in the November 1955 agreements and with Pfizer on December 15, 1955, so that they could not. The government also contended that Bristol did not want Squibb and Upjohn to have any right to sell bulk tetracycline themselves, and arranged to deny them this as well. The same contentions are made, in much smaller compass, in the government's present brief (G.Br. 20-21, 23, 34-35).

Bristol argued in the Court of Appeals that the trial court had committed errors in connection with these aspects of the case, but the Court of Appeals apparently did not reach or consider these arguments in view of its decision that the trial court's misinterpretation of the Squibb and Upjohn licenses might in itself have led the jury to convict. Because these other aspects are still the subject of contentions in the government's brief, however, we believe a discussion of three of them will be helpful to the Court in its review.

Evaluation of these contentions requires an understanding of what Squibb and Upjohn actually wanted in this regard, what "arrangements" were made and what rights they actually received or otherwise had—all part of a circumstantial framework for determining Bristol's guilt or innocence of the indictment's charges of conspiracy to exclude Squibb and Upjohn from manufacturing and from selling bulk.

The Rights Desired by Upjohn

The instructions to the jury included the following:

> "You may consider the evidence that shortly before December 1955 Upjohn sought from Pfizer a license

to manufacture tetracycline, but that Upjohn and Squibb received in the settlement only licenses to compound, use and sell products, so that they had to have some manufacturer as a source of the bulk material." (4985a)

The trial court in giving these instructions, and in refusing requests for correction, committed the following errors:

(1) It singled out an item of evidence, favorable to the government's position against Bristol relating to the issue of Upjohn's interest in manufacturing rights in a possible settlement, and not only failed to balance the item so stressed with any of the other undisputed evidence on the point favorable to Bristol's position but refused to call the jury's attention to a disclaimer by the government in the bill of particulars which contradicted the inference prejudicial to Bristol which the selected item suggested.

(2) Its reference to the single item of evidence was based on the trial court's own interpretation of that evidence, when the interpretation should have been left to the jury.

At the October 4, 1955 meeting between Gilmore of Upjohn and McKeen, Gilmore made a settlement proposal—rejected by McKeen—which included a license to Upjohn "to make, use, sell or have made for us" (GX 423, 8865a-88a; 3204a-06a). Gilmore testified that "have made for us" meant "I suppose just what it says, have somebody else make it for us, maybe we'd have Bristol make it" (3206a). There is no evidence that Upjohn was in any position in late 1955, from the standpoint of research, organisms, know-how, production facilities, etc., to manufacture tetracycline commercially itself (3192a, 3241a-43a; cf. 3028a-29a).

The interpretation of this phrase as to whether Gilmore wanted at that time *either* the right to make *or* the right to "have made for us", was a question for the jury. Gilmore

was not questioned on this point. And if the "either-or" interpretation was the correct one, as we contend it was, then Bristol obtained from Pfizer for Upjohn all that Upjohn desired (especially in view of the implied rights to manufacture granted by the Upjohn license, as noted *infra*). During argument on Bristol's motion for acquittal at the close of the government's case, the trial court stated that *it* read the phrase "to make, use, sell or have made for us" as referring to a license which included *both* the right to make *and* the right to have made for the licensee, a "license to cover us whichever way we want to do it" (4549a). It was, in our view, beyond fair comment, an invasion of the jury's province and prejudicial to Bristol for the trial court in its instruction to stress to the jury his own conclusory interpretation that "Upjohn sought from Pfizer a license to manufacture" and then to refuse to refer, after timely exception by Bristol (5013a-14a), to the precise words used by Gilmore.

Furthermore (and apart from whether "shortly before" fairly characterizes an event ten weeks earlier than the Schwartz-McKeen meeting of December 14-15, 1955), it was also unfair to Bristol for the trial court to refer to Gilmore's statements at the October 4, 1955 meeting without mentioning (a) other facts intervening between those statements and the December 14-15, 1955 meeting, and (b) the government's disclaimer in the bill of particulars that Upjohn had requested Bristol to obtain in any settlement a license for Upjohn which included the right to manufacture.

The trial court's "shortly before" statement was prejudicial to Bristol because it implied that at the time of the Schwartz-McKeen meeting on December 14-15, 1955 Upjohn's interest in full manufacturing rights was an active one known to Schwartz. The jury should have been reminded of other facts tending to show that Upjohn was

no longer interested—if it ever had been*—in obtaining such manufacturing rights, and thus tending to show the unlikelihood of any agreement between Bristol and Pfizer to deprive Upjohn of such rights.

As noted above, pp. 11-13 after Upjohn in October 1955 had opened separate settlement talks with Pfizer, Bristol's representatives went to Upjohn's offices in Kalamazoo for discussions which resulted in the bulk sales agreement of November 3, 1955 (GX 108; 8698a-705a). This agreement assured Upjohn of a source of supply of tetracycline for the duration of the Pfizer litigation plus a period of three years. Upjohn was relieved from the obligation to indemnify Bristol, and Bristol in turn agreed to indemnify Upjohn with respect to damages for infringement of the Pfizer patent.

The agreement also provided that if Bristol obtained a settlement of the litigation within six months, Upjohn would pay half of the cost of settlement if the settlement included a license to Upjohn which "may, however, be limited to your right to purchase, use and sell tetracycline to the drug trade" (GX 108 ¶ G, 8703a). The agreement did not obligate Bristol to get this or any license for Upjohn in any settlement, the only consequence of Upjohn not getting such a license being that Bristol would have to pay all the settlement costs itself with respect to sales to Upjohn.

The government conceded in its bill of particulars that this agreement between Bristol and Upjohn was not illegal without reference to other facts (280a-81a). The propriety of the agreement was further conceded when the government stated expressly that there were no actions which Bristol had taken prior to December 14-15, 1955 "that we criticize or say are illegal" (4866a-67a). And the government expressly disclaimed in its bill of particulars that

* Compare the statements in the January 1955 letter from Upjohn's counsel to Gilmore, noted at G. Br. 20. But see the later letter in February 1956 (PX 607, 12529a; 3240a-41a).

Upjohn ever asked Bristol to obtain manufacturing rights for it (295a-96a, 302a).

In December 1955 under the stimulus of the wiretapping incident, Bristol arranged a meeting with Pfizer. When Schwartz asked that Upjohn and Squibb be granted the licenses defined in the November 1955 contracts, McKeen was reluctant to grant even the licenses requested and did so only at Schwartz' insistence (3041a-42a).

Following the December 14-15, 1955 meeting, Upjohn, as shown by its internal February 1, 1956 letter, confirmed that its interest was in, and that it was satisfied with, a license to purchase, use and sell when McKeen phoned in late January 1956 (PX 607, 12529a; 3240a-41a). It again confirmed this when it signed the formal settlement and license agreements on March 28, 1956. The record shows no request thereafter by Upjohn to Pfizer seeking the full right to make, although Upjohn was perfectly free to make such a request if it had desired to do so.

The trial court made no mention of any of the foregoing events which took place between Upjohn's October 1955 meeting with Pfizer and the receipt of its license in March 1956. Nor did it mention the government's concession in the bill of particulars that Upjohn never requested Bristol to obtain manufacturing rights. On three occasions the trial court refused Bristol's request to tell the jury of this disclaimer.*

By mischaracterizing and mentioning only Upjohn's October 1955 request and the license Upjohn received from Pfizer, and by omitting any reference to the intervening events and to the significant government concessions, the trial court committed prejudicial error.

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* When it rejected Bristol's Request to Charge No. 32A (4599a, 5594a-600a), during the argument on exceptions to the charge (5014a-17a, 5049a), and after the jury during its deliberations had asked for copies of the indictment, bill of particulars and instructions, receiving only the instructions (5069a-70a; see 5051a, 5058a-59a).

The Implied Rights Received by Squibb and Upjohn

The erroneous intimation in the instruction that Upjohn received in the settlement a license which was less than it wanted, took on added prejudicial weight from the trial court's refusal to instruct the jury that, so far as Pfizer's patent was concerned, the license Upjohn (and Squibb) received (1) allowed it to purchase bulk tetracycline abroad (in a country such as Italy where Pfizer had no patent on tetracycline) and import it for compounding, use and sale here,* and (2) gave Upjohn (and Squibb) the right to make bulk tetracycline in this country itself, or to have bulk tetracycline made for it here by someone other than Pfizer or a licensed manufacturer such as Bristol, if necessary to enable it to exploit the rights it had received under the license. These legal effects of the license were set forth in Bristol's Request to Charge No. 32A (5594a-600a), rejected by the trial court before charging the jury (4699a) and again during argument on exceptions to the charge (5019a-21a, 5049a). When Bristol, during the argument on exceptions, referred to Upjohn's implied right to make, if necessary, the trial court stated "I have never heard that suggestion until this minute"; Bristol pointed out that the law had been set forth in its Request to Charge No. 32A, which the trial court had previously denied (5019a-20a).

This principle that in limited licenses such as those granted to Squibb and Upjohn there is an implied or "contingent" right to make, or have made, if necessary, has

* Tetracycline from Italy was being imported into this country for sale to the government as early as 1959 (3545a-48a, 6932a-36a). The November 1955 requirements contracts Squibb and Upjohn had with Bristol (GX 83, 108; 8639a-47a, 8698a-705a) were to expire in March 1959, three years after formal settlement of the litigation. Schwartz testified that at the time of discussions with Upjohn regarding the license to purchase, use and sell referred to in the November 1955 agreement, his understanding was that such a license would permit Upjohn to purchase tetracycline from others and import it (3000a-01a).

long been well established. See *e.g. Dunkley Co.* v. *California Packing Corporation*, 277 Fed. 996, 998 (2d Cir. 1921), *cert. denied*, 257 U. S. 644 (1921); *Illingworth* v. *Spaulding*, 43 Fed. 827, 831 (D.N.J. 1890); *Steam Stone Cutter Co.* v. *Shortsleeves*, 22 Fed. Cas. 1168 (No. 13,334) (C.C.D. Vt. 1879); 4 DELLER'S WALKER ON PATENTS, 2d ed., § 388 (1965). In the *Steam Stone Cutter* case, the Court stated (pp. 1168-69):

> "It is a maxim of the common law, that any one granting a thing impliedly grants that also without which the thing expressly granted cannot be had; or, as expressed more pertinently to the precise question here by Twysden, J., in Pomfret v. Ricroft, 1 Saund. 321, 'when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use'. [citations omitted] The foundation of it is the presumed intention of the grantor to make the grant effectual. [citations omitted] And it is as applicable to grants of rights under patents, whether assignments or mere licenses, as to any other subject, where the true intent is sought for. Curt. Pat. § 214. This grant by Wardwell would not pass anything at all, unless the grantee could, in some way, procure the machines. It is suggested, in argument, that the intention was that they should be procured of the patentee, or from a manufacturer under him. But no grant of any right to use such machine would be necessary. The sale of it would carry the right. . . .
>
> "As this grant is now viewed, the right to make machines for the use expressly granted passed, and this would include the right to procure them to be made, and cover the making them by the one procured to make them."

Clearly, the government's position that Bristol conspired with Pfizer to bar Upjohn and Squibb from making tetracycline and from buying tetracycline in bulk elsewhere than from Bristol would have been undercut in the eyes of

the jury if it had been instructed on the law, as it should have been, that, so far as Pfizer's patent was concerned, the license rights Upjohn and Squibb received allowed them to import tetracycline from abroad and gave them certain rights to make or have made for them in this country if Bristol (and Pfizer and Cyanamid) was unable or unwilling to sell them bulk tetracycline, or would do so only at an exorbitant price.*

The Rights Squibb and Upjohn Had to Sell Bulk Purchased from Bristol

In another respect as well the trial court refused to give proper instructions as to the legal principles relevant to Pfizer's licenses to Squibb and Upjohn. Once Bristol became a licensed manufacturer, Squibb and Upjohn needed no licenses to buy Bristol's tetracycline. Such purchases were free of the patent, and Squibb and Upjohn could do as they pleased with the bulk tetracycline they bought, reselling it in bulk if they chose to.** See *e.g. United States v. Univis Lens Co.*, 316 U. S. 241, 250-252 (1942). But the trial court refused to charge the jury to this effect, as it was asked to do in Bristol's Request to Charge No. 32A (4699a; 5594a-600a).

Had the trial court correctly instructed the jury on the law and the legal effect of the licenses, it would have undercut the government's argument to the jury that Bristol,

* In the *Illingworth* case, *supra*, the Court quoted from *Woodworth v. Curtis*, 30 Fed. Cas. 565 (No. 18,013) (C.C.D. Mass. 1847), where the license was "to use one machine in Boston", as follows: "The first question is, did this involve the right to make or procure to be made the machine thus permitted to be used? I think it did. Otherwise the whole license might be defeated, if the grantor refused to make for him at all, or to make at any but an exorbitant price, or demanded another consideration for a right in the grantee to make for himself, under a license like this."

** The FTC held ". . . Squibb and Upjohn did not need licenses from Pfizer to sell tetracycline purchased from Bristol". *Matter of American Cyanamid Co. et al*, No. 7211, 63 FTC 1747, 1783 (1963) (Commission's Finding No. 27).

through Pfizer, unlawfully imposed on Squibb and Upjohn licenses which restricted "their otherwise free right to sell in bulk" and prevented them from reselling bulk tetracycline purchased from Bristol (*e.g.* 4880a-83a).

Here again, as in its statements to the jury that the Squibb and Upjohn licenses "barred" manufacture, the trial court misapprehended the legal effect of these licenses. The licenses *granted* certain rights to the licensees, and interfered in no way with the licensee's right to sell bulk tetracycline from an authorized source such as Bristol.

Here again also, the trial court's error in this regard unfairly prejudiced Bristol in the eyes of the jury with respect to the government's charges.

II

The Court of Appeals Correctly Held That There Was Prejudicial Error in the Trial Court's Failure to Instruct the Jury Regarding Bristol's "Pre-conspiracy" Conduct and in the Misleading Instruction Given Concerning the Date of Bristol's Alleged Entry.

As the Court of Appeals observed, all of the means and methods in the indictment referring to Bristol "preceded the date Bristol is alleged to have entered the conspiracy" (426 F.2d at 47; 12609a). The Court of Appeals said that the harmful effect upon Bristol of the proof of these alleged means and methods "could only have been minimized by the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14-15, 1955 as proof of Bristol's being in any conspiracy" prior to that date* (426 F.2d at 47; 12609a-10a). The fail-

* The government contends that to "instruct the jury that Bristol's pre-December 1955 conduct could not be considered as proof of Bristol's being in *'any'* conspiracy would be a clear departure from established principles" (G. Br. at 83 et seq.). It adds that "Bristol

ure of the trial court to give such instructions, plus the erroneous instructions actually given that " 'it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges,' could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14-15, 1955" (426 F.2d at 47; 12609a-10a).

Furthermore, a "comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on [Bristol's] identity of price [with Pfizer and Cyanamid] and restricted bulk sales [to Squibb and Upjohn only]" prior to December 14-15, 1955, and:

> "It was thus incumbent upon the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14-15 meetings been changed merely by continuance into acts thereafter illegal." (*Ibid*)

The Court of Appeals noted that the proof of Bristol's alleged entry into the conspiracy was entirely circumstantial and that the government's hypothesis of conspiracy was directly contrary to the direct testimony of the witnesses

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never requested that the jury be told, as the court of appeals would require, that it could not consider Bristol's pre-December 1955 conduct 'as proof of Bristol's being in *any* conspiracy'" (G.Br. 84). And it proceeds to argue that evidence of pre-conspiracy conduct is relevant to motive, intent and design, a point we deal with at pages 48-49, *infra*.

The short and complete answer to these contentions is that when read fairly and in context, the opinion of the Court of Appeals says in effect that the jury should have been told that it could not consider Bristol's part in events prior to December 14-15, 1955 as proof of Bristol's being in any conspiracy *prior to that date*. It is an undisputed matter of record that Bristol, by certain of its Requests to Charge, sought instructions by the trial court that the jury could not consider evidence of events prior to December 14-15, 1955 as proof that Bristol joined any conspiracy *"prior to that date."* See, *e.g.*, Bristol Request No. 7B (5587a).

and the documents evidencing their agreement. In such a situation, the Court of Appeals said that precise instructions were essential:

> "There was no direct proof of conspiracy to be found in the Schwartz-McKeen versions as developed extensively on direct and cross-examination relating to the December 14-15, 1955 meetings. Nothing illegal is to be found in the written agreements embodying the understandings reached. But, in a case so wholly dependent for conviction upon the jury's drawing of inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement, the importance of instructions cannot be overemphasized." 426 F.2d at 47; 12610a.

Although disclaiming any actual knowledge of "what factors were decisive in the jury's collective mind in reaching their verdict", the Court of Appeals held that "failure to differentiate between the legal and the illegal was prejudicial error." (*Ibid*)

The Court of Appeals' Determination of Prejudicial Error is in Accordance with Well-Settled Principles

The failure to instruct on a basic issue in a precise and understandable manner that clearly differentiates between the legal and illegal is prejudicial error. *Yates* v. *United States,* 354 U. S. 298, 324-327 (1957). Especially is this true where the evidence in the record is itself equivocal:

> ". . . the very subtlety of these distinctions [between advocacy or teaching of abstract doctrines (the legal) and advocating the overthrow of the government by force and violence (the illegal)] required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal

> character of the evidence in this record . . . Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such 'an equivocal direction to the jury on a basic issue' *Bollenbach* v. *United States*, 326 U. S. 607, 613." *Yates* v. *United States, supra*, at 327.

Particularly in the context of a complicated conspiracy case such as this it cannot be said with fair assurance that the failure to include such unequivocal and correct instructions in the charge did not sway the jury. *Kotteakos* v. *United States*, 328 U. S. 750 (1946).

There is nothing novel in the insistence by the Court of Appeals on the "clearest instructions" regarding Bristol's "pre-conspiracy" activities. This is merely an application of "The classic rule to be applied in these joint conspiracy trials . . . stated by Mr. Justice Rutledge in Blumenthal v. United States, 1947, 332 U. S. 539, 559-560 . . ." *United States* v. *Kelly*, 349 F.2d 720, 756 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966). See also *United States* v. *Bless*, 422 F.2d 210 (2d Cir. 1970) where the trial court's failure to give a charge (similar to that requested in the case at bar) with respect to events prior to one defendant's alleged entry into the conspiracy was held to be reversible error.

The issue of whether Bristol joined the alleged conspiracy at the December 14-15, 1955 meeting was a basic one. The government conceded, and indeed, asserted, that prior to this date "there is nothing about the activities of Bristol that we criticize or say are illegal" (4867a). Yet virtually all of the evidence relating to Bristol concerned its activities prior to this meeting.

Bristol made a timely request for instructions that evidence of events prior to December 14, 1955 could not be considered as proof of participation by it in any conspiracy prior to that date and that evidence that Bristol's business

practices were the same before as after December 14, 1955 could be considered as evidence that Bristol never joined any conspiracy (5586a-88a). Before counsel summed up to the jury, the trial court said that the charge would include the substance of this request (4658a-59a).* Thereafter, and contrary to this ruling the trial court failed to include the substance of Bristol's request in the charge.**

The trial court compounded this error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4964a). The trial court conceded subsequently that this portion of the charge might have a "possibly misleading impact" and the "incidental result of misleading the jury" (5096a, 5097a-98a).

Although Bristol took specific exception to each of the foregoing errors (5007a-13a), the trial court overruled all exceptions. Yet, as the Court of Appeals said, these errors

* "A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence. . . ." *United States* v. *O'Connor*, 237 F.2d 466, 474, n. 8 (2d Cir. 1956).

** Bristol urged before the Court of Appeals, but that Court apparently did not reach, the contention that this failure was prejudicial error under Rule 30 of the Federal Rules of Criminal Procedure. Rule 30 requires the trial court to rule upon requests to charge in such a manner that trial counsel will know what the charge will contain and be able to present the case intelligently to the jury during summation. Failure to so rule is reversible error in and of itself. In *Wright* v. *United States*, 339 F.2d 578, 579-580 (9th Cir. 1964) the trial court indicated to defense counsel that it would "give the general instructions" requested; defense counsel's summation was based in part upon the theory reflected in the requests to charge; omission from the actual charge of the requested instructions, or others dealing with defense counsel's theory, was under these circumstances reversible error. Also in *Ross* v. *United States*, 180 F.2d 160, 165-166 (6th Cir. 1950), the trial court failed to rule, before counsel's summation, on each request to charge theretofore submitted and failed to include all correct instructions requested by defense counsel in substance or otherwise; this was one of several errors requiring reversal. *Cf. Downie* v. *Powers*, 193 F.2d 760, 766-67 (10th Cir. 1951).

"could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14-15, 1955" (426 F.2d at 47; 12610a). On this record, and in view of the settled principles previously established by the decisions of this Court, this "failure to differentiate between the legal and the illegal" was indeed "prejudicial error" (*Ibid*).

The Instructions Permitted the Jury to Convict Bristol for Acts Prior to the Date It Allegedly Entered the Conspiracy

The government contends that the ruling of the Court of Appeals "does not stand up in the context of the trial" (G.Br. 80). This contention is demonstrably false.

The government begins by ignoring the errors found by the Court of Appeals, dwelling instead upon instances in arguments of counsel and in the trial court's preliminary instructions to the jury before trial in which the jury was correctly advised (G.Br. 80-82). But the errors in the final instructions scarcely could have been mitigated by the previous arguments of counsel or by the preliminary instructions that the trial court had given months earlier. For at the very outset of the final instructions the trial court told the jury that the instructions to follow were controlling:

> "You have heard the arguments of very able counsel urging the different inferences and conclusions they wish you to draw from that evidence. It is my duty to now instruct you on the law. It is your duty to follow and apply these instructions. *Then, exclusively upon the evidence and under these instructions,* it is your critical and vital function to determine the facts and seek a verdict." (4941a)*

Furthermore, the trial court enjoys an exalted status in the eyes of the jury, the jury looks to him alone for guid-

* The trial court repeated this admonition a few pages later in the charge: "I have told you, and I say again, that the evidence and these instructions must be the *exclusive* materials for your judgment . . ." (4943a).

ance, and his influence upon the jury "is necessarily and properly of great weight." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). As in *Bollenbach*, the government's argument here amounts to an assertion "that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them." 326 U.S. at 613-14. Here, as in *Bollenbach*, "[t]o do so would transfer to the jury the judge's function in giving the law." *Ibid.*

The government next argues in effect that the errors found by the Court of Appeals really didn't exist because the trial judge's instructions "emphasized" that Bristol could not be convicted for conduct prior to December 1955 (G.Br. at 82-83). The difficulty with this argument is that the portions of the charge relied upon by the government simply did not say at all, let alone "emphasize", that Bristol could not be convicted for conduct prior to December 14-15, 1955. The portion of the charge set forth verbatim in the government's brief (G. Br. at 83) does no more than state in abstract terms the routine admonition that the jury was to pass upon only the charges made and defended in this case. This is not a statement that Bristol could not be convicted on the basis of its pre-December 1955 conduct, and it in no way "emphasizes" such a concept. Nor was any such concept stated or "emphasized" on any of the "four separate occasions during the instructions" when the trial court said that the government claimed Bristol joined the conspiracy in December 1955 (G.Br. 83). For on each such occasion the trial court simply said, without more, that the government claimed Bristol entered the alleged conspiracy at the December 14-15, 1955 meeting.*

* Significantly, it was immediately following the first of these four occasions (4963a) that the trial court erred and told the jury "it

The government's concluding argument is that an instruction that Bristol's pre-December 1955 conduct could not be considered as proof of Bristol's being in "any" conspiracy would have been a "clear departure from established principles" (G.Br. 83-87).* It says that because evidence of pre-conspiracy conduct is relevant to motive, intent and method of operation, and may also be a basis for showing illegal design, "both sides had the right to emphasize that conduct in presenting evidence and in argument" (G.Br. 83-84), citing *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir. 1964), *cert. denied*, 379 U. S. 828 (1964).

Houlihan holds that there is no error in admitting evidence of pre-conspiracy conduct to show motive to form a conspiracy thereafter when the jury is "specifically instructed" that the evidence of pre-conspiracy conduct "was admitted only to prove motive." 332 F.2d at 14-15. We do not quarrel with the general correctness of this proposition. But it has no relevance here. The government did not request that the jury be "specifically instructed" that evidence of events occurring prior to December 14-15, 1955 "was admitted [against Bristol] *only* to prove motive", and the trial court gave no such instruction.** Even if such instructions had been given, they could not and would not

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is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (4964a).

* As we pointed out at pages 41-42 above, this argument is based on a misconception of the meaning, in context, of the statement of the Court of Appeals.

** When the trial court stated that it would grant the substance of Bristol's request that evidence of events prior to December 14, 1955 could not be considered as proof of its participation in any conspiracy prior to that date, the government requested that as a corollary the jury also be told that it could consider such evidence as "background", and the trial court agreed (4659a). Apparently as an incidental result of the failure to give the substance of Bristol's request, the trial court also failed to tell the jury that it could consider events prior to December 14-15 as "background"; nowhere in the charge was any such "background" instruction given.

have obviated the need for a comprehensive charge differentiating as to Bristol between the legal and the illegal. The government's "motive" argument thus is an irrelevance which in no way detracts from the prejudicial error resulting from the trial court's failure to give such comprehensive instructions.

Bristol's conduct before December 1955 concededly was innocent and remained unchanged thereafter. The trial court's instructions did not furnish adequate guidance to the jury as to the inferences it could properly draw from this evidence. For the trial court's failure to give the substance of the instruction requested by Bristol permitted the jury to avoid coming to grips with, or at least to leave unresolved, the very hard question of how Bristol's entry into a conspiracy can be rationally inferred from conduct and business policies subsequent to December 14-15, 1955 which differed not at all from concededly innocent, non-conspiratorial policies prior to that date.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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